BURSA MALAYSIA SECURITIES BHD

v.

GAN BOON AUN

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
HELILIAH MOHD YUSOF JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-02-439-2008]
11 FEBRUARY 2009

CIVIL PROCEDURE: *Action - Pending or current proceedings - Sub judice rule - Nature of*

CIVIL PROCEDURE: *Judicial review - High Court - Delay - Party failing to file application for judicial review within 40-day period - No reasonable explanation offered for 5-month delay - Whether party had failed to act promptly - Rules of the High Court 1980, O. 53 r. 3(6)*

CIVIL PROCEDURE: *Judicial review - Stay of proceedings pending judicial review - 'Proceedings', definition of - Whether internal decision making process of statutory body a 'proceeding' - Rules of the High Court 1980, O. 53 r. 3(5)*

WORDS & PHRASES: *'Proceedings' - Rules of the High Court 1980, O. 53 r. 3(5)*

The respondent was a non-independent executive director cum Chief Executive Officer of Transmile Group Bhd ('Transmile') – a company listed on the Official List of the appellant – a stock exchange vested with certain statutory functions under the Capital Markets and Services Act 2007 (CMSA 2007). On 24 May 2007, the appellant issued the respondent a notice to show cause why he should not be penalised for breaching its Listing Requirements in respect of a delay in the submission of Transmile's annual audited accounts for the year 2006. On 10 July 2007, the appellant issued the respondent a second notice in respect of the delay: (i) in the submission of Transmile's Annual Report for the financial year 2006; and (ii) in the submission of Transmile's Quarterly Report for the First Quarter of 2007. On 12 July 2007, the Securities Commission charged the respondent with an offence under the Securities Industry Act 1983 ('the criminal trial'), for making a misleading statement in a material particular, in

A Transmile's Quarterly Report for the fourth quarter of 2006. Subsequently the appellant fixed the hearing of its notices ('the enforcement action') on 29 August 2007 and informed the respondent of the same. The respondent then wrote to the appellant asking for the enforcement action to be deferred *sine die* B pending the criminal trial on grounds of *sub judice*. The appellant refused to do so prompting the respondent to apply to the High Court under O. 53 r. 3 RHC 1980 for leave to *inter alia* stay the enforcement action pending disposal of the criminal trial. In the High Court, respondent's counsel orally applied for the C deliberations of the appellant to be stayed until the hearing of the judicial review. The High Court allowed the respondent's application and the stay of deliberations. The appellant appealed to the Court of Appeal.

D **Held (allowing the appeal with costs)**
Per Heliliah Mohd Yusof JCA delivering the judgment of the court:

(1) The law in relation to what may be published concerning current legal proceedings is sometimes referred to as the *sub* E *judice* rule. The publications must be such that they are intended to impede or prejudice the administration of justice which may in turn constitute acts punishable as contempt of court. The true nature of the doctrine itself requires that there have to be established an *actus reus* and *mens rea* to cause F certain publications which would have a prejudicial effect on the criminal proceedings. In the instant appeal, it could not even be gleaned whether the situation could lead to civil contempt. The court was being invited to consider assertions which were merely speculative. (para 29) G

(2) The respondent had not established what parts of the materials in the criminal trial would overlap the material in the enforcement proceedings. Matters in the enforcement action would relate to delay whereas matters in the criminal trial H would involve the essentials of 'making misleading statements'. The respondent had not shown that there was a situation where the court and the appellant's Listing Committee would contemporaneously be considering the same or identical issues in a manner that one would affect the evaluation in the other. I The respondent's action was thus premature and he had failed to raise an arguable case. (para 34)

(3) The respondent was not able to persuade the Court of Appeal that the enforcement proceedings were in excess of the appellant's statutory authority or so erroneous in law such that it rendered the appellant susceptible to judicial review. In a highly fluid financial market the true nature of the reliefs sought by the respondent were calculated to impose a crippling delay in derogation of the principle of timeliness and accuracy, which is inept in matters of financial control. (para 25)

(4) The respondent failed to furnish any explanation or justification for his the delay in filing the application, in breach of the 40-day requirement under O. 53 r. 3(6) of the RHC 1980. In effect the very conduct of the respondent in maintaining that the *sub judice* rule applied and declining to submit representations lent itself to a situation where there was a self imposed effluxion of time. It was the respondent at the first instance who asserted that he would seek legal redress which materialised in the form of the application for leave for judicial review when the notice was filed on 21 March 2008 – more than five months from the date that the appellant refuted assertions about the applicability *sub judice* rule. There was an absence of prompt action without any reasonable explanation given for the delay. (para 50)

(5) In the instant case, the respondent made an oral application for an *interim* order to stay the deliberations of the Listing Committee. Such an order was prayed for and alluded to for the first time in the written submissions submitted by the respondent, whose application for leave for judicial review was made *ex parte*. Since the *ex parte* stage was not converted inter partes, which could have been done, the respondent was not permitted, during appeal, to raise objections to the effect that the appellant was making statements from the Bar, for its alleged failure to file affidavits to oppose the *ex parte* notice of application for leave. In the instant case, there was totally absent any affidavit supporting the application for an order for stay. Any arguments put forth in support of the order for stay had thus to be taken as statements from the Bar. (para 54)

(6) The court would be re-writing the RHC 1980 if it were to permit an interpretation of the words "proceedings in question" under O. 53 r. 3(5) to be applicable to an internal decision making process made by the appellant to convene a committee to deliberate on the non-compliance by the respondent of the Listing Requirements of the appellant. There was in the instant case a serious and clear misdirection in the exercise of a discretion which warranted appellate interference. It would spell an excess of power if "stay of proceedings" in the appeal was to be extended to the internal deliberations of the appellant – it being a commercial entity vested with regulatory measures in the capital market. Nothing was alleged concerning illegalities, but merely unsubstantiated allegations of prejudice amounting to an abuse of process in seeking the court's intervention. (para 62)

Bahasa Malaysia *Translation Of Headnotes*

Responden adalah seorang Pengarah Urusan tidak bebas dan Ketua Pegawai Eksekutif Transmile Group Bhd ('Transmile') – sebuah syarikat yang tersenarai di Senarai Rasmi perayu – sebuah bursa saham yang diberi fungsi-fungsi statutori tertentu di bawah Akta Pasaran Modal dan Perkhidmatan 2007 ('CMSA 2007'). Pada 24 Mei 2007, perayu mengeluarkan notis tunjuk sebab kepada responden kenapa beliau tidak boleh dikenakan hukuman kerana melanggar Syarat-syarat Penyenaraian perayu ekoran kelewatannya mengemukakan akaun tahunan berodit Transmile bagi tahun 2006. Pada 10 Julai 2007, perayu mengeluarkan pula notis kepada responden berkaitan kelewatan: (i) mengemukakan Laporan Tahunan Transmile bagi tahun kewangan 2006; dan (ii) mengemukakan Laporan Suku Tahunan Transmile bagi Suku Pertama 2007. Pada 12 Julai 2007, Suruhanjaya Sekuriti telah mendakwa responden atas kesalahan di bawah Akta Perindustrian Sekuriti 1983 ('perbicaraan jenayah'), kerana dengan secara material membuat kenyataan palsu dalam Laporan Suku Tahunan Transmile bagi Suku Keempat 2006. Berikutnya, perayu menetapkan tarikh pendengaran notis-notisnya ('tindakan penguatkuasaan') pada 29 Ogos 2007 dan memberitahu responden mengenainya. Responden menulis kepada perayu memohon supaya tindakan penguatkuasaan ditangguhkan *sine die* sementara menunggu perbicaraan jenayah atas alasan *sub judice*. Perayu

enggan berbuat demikian dan responden memohon ke Mahkamah Tinggi di bawah A. 53 k. 3 KMT 1980 antara lain untuk kebenaran menangguhkan tindakan penguatkuasaan sementara menunggu pelupusan perbicaraan jenayah. Di Mahkamah Tinggi, peguam responden memohon secara lisan supaya deliberasi perayu digantung sementara semakan kehakiman didengar. Mahkamah Tinggi membenarkan permohonan responden dan dengan itu telah menggantungkan deliberasi. Perayu merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Heliliah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) Undang-undang berkaitan dengan apa yang boleh disiarkan berhubung prosiding undang-undang semasa sering dirujuk sebagai kaedah *sub judice*. Penyiaran hendaklah sebegitu rupa sehingga menghalang atau memprejudis pentadbiran keadilan sekaligus menjadikannya satu perbuatan menghina mahkamah yang boleh dihukum. Sifat sebenar doktrin ini mengkehendaki supaya harus terlebih dahulu dibuktikan suatu *actus reus* dan *mens rea* untuk menyebabkan penyiaran yang mempunyai kesan prejudis terhadap prosiding jenayah. Dalam rayuan semasa, ianya tidak dapat dikatakan bahawa keadaan yang ada akan membawa kepada penghinaan, hatta suatu penghinaan sivil sekalipun. Jelas bahawa mahkamah telah diminta untuk membuat pertimbangan terhadap pengataan-pengataan yang hanya berbentuk spekulatif.

(2) Responden tidak membuktikan bahagian manakah dari material perbicaraan jenayah yang bertindih dengan prosiding penguatkuasaan. Perkara-perkara dalam tindakan penguatkuasaan adalah berkaitan dengan kelewatan, sementara perkara-perkara dalam perbicaraan jenayah melibatkan intipati 'membuat kenyataan palsu'. Responden tidak membuktikan bahawa terdapat situasi di mana mahkamah dan Jawatankuasa Penyenaraian perayu akan secara serentak mempertimbang isu-isu yang sama atau serupa dengan sebegitu cara sehingga yang satu akan menjejaskan penilaian yang satu lagi. Dengan itu tindakan responden adalah pramatang dan beliau gagal membangkitkan kes yang boleh dihujah.

(3) Responden gagal meyakinkan Mahkamah Rayuan bahawa prosiding penguatkuasaan adalah melampaui kuasa statutori

perayu ataupun amat salah di sisi undang-undang sehingga menyebabkan perayu tertakluk kepada semakan kehakiman. Dalam suatu pasaran kewangan yang mudah berubah-ubah, sifat sebenar relif yang dituntut responden akan hanya mendorong kepada kelengahan yang ketara dan melanggari prinsip cepat dan tepat, dan itu adalah tidak wajar bagi hal-hal berkaitan kawalan kewangan.

(4) Responden gagal mengemukakan sebarang penjelasan atau justifikasi atas kelewatannya dalam memfail permohonan, sekaligus melanggar syarat 40 hari di bawah A. 53 k. 3(6) KMT 1980. Secara berkesannya, tingkah laku responden sendiri dalam menghujahkan keterpakaian kaedah *sub judice* serta keengganannya mengemukakan representasi telah membangkitkan situasi di mana wujud pelupusan masa yang berpunca dari beliau sendiri. Responden sendirilah yang sedari tindakan awalan lagi menegaskan bahawa beliau akan mendapat penyelesaian undang-undang yang kemudian terzahir dalam bentuk permohonan kebenaran untuk semakan kehakiman, iaitu semasa notis mengenainya difailkan pada 21 Mac 2008 – lebih dari lima bulan dari tarikh perayu menyangkal dakwaan mengenai keterpakaian kaedah *sub judice*. Maka tidak wujud satu tindakan yang cepat dan tidak juga ada penjelasan diberikan bagi kelewatan berkenaan.

(5) Dalam kes semasa, responden telah membuat permohonan lisan untuk perintah *interim* bagi menangguhkan deliberasi Jawatankuasa Penyenaraian. Perintah tersebut dipohon dan dirujuk buat pertama kali dalam hujahan bertulis yang dikemukakan oleh responden, yang juga telah membuat permohonan semakan kehakiman secara *ex parte*. Oleh kerana peringkat *ex parte* tersebut tidak ditukar kepada *inter partes*, walaupun itu boleh dibuat, maka responden tidak boleh dibenarkan, di peringkat rayuan, untuk membangkitkan bantahan bahawa perayu membuat kenyataan dari meja peguam berkaitan kegagalannya memfailkan affidavit bagi menentang notis permohonan kebenaran *ex parte* tersebut. Dalam kes semasa, tiada afidavit difailkan bagi menyokong permohonan untuk perintah penangguhan. Maka sebarang hujah yang dikemukakan bagi menyokong perintah penangguhan

hendaklah dianggap sebagai kenyataan dari meja peguam sahaja. A

(6) Mahkamah akan menulis semula KMT 1980 jika mahkamah membenarkan tafsiran perkataan "prosiding tersebut" di bawah A. 53 k. 3(5) dipakai kepada proses membuat keputusan B dalaman seperti yang dibuat oleh perayu bilamana ia menubuhkan jawatankuasa untuk membincangkan ketidakpatuhan responden terhadap Syarat-syarat Penyenaraiannya. Telah wujud salah arahan yang jelas dan serius berhubung pelaksanaan budibicara dalam kes semasa yang mewajarkan C campur tangan peringkat rayuan. Ianya adalah satu pelanggaran batasan kuasa jika "penggantungan prosiding" di dalam rayuan diperluaskan sehingga mencakupi perbincangan dalaman perayu – memandangkan perayu adalah suatu entiti komersial yang diberi kuasa untuk mengawal pasaran kewangan. Tiada D dakwaan dibuat mengenai tindakan-tindakan yang melanggar undang-undang. Dalam memohon campur tangan mahkamah, yang diutarakan hanyalah dakwaan-dakwaan kosong tentang tindakan yang dikatakan berprejudis dan menjurus kepada salah guna proses. E

Cases(s) referred to:

AG v. Times Newspaper Ltd [1973] 3 All ER 54 ***(refd)***

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Harris Mohd Salleh v. The Returning Officer, Ismail Majin & Ors And Another Petition (No 2) [2001] 3 CLJ 838 HC ***(refd)*** F

Kwikasair Industries Ltd v. Sydney Stock Exchange Ltd BC 6800002 [1968] CCH A SLC 30 ***(refd)***

Minister of Foreign Affairs Trade and Industry v. Vehicles and Supplies Ltd [1991] 1 WLR 550 ***(refd)***

Otter Gold Mines Ltd v. Deputy Forest (AAJ) and Others [1997] 22 AC SR 713 ***(refd)*** G

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

R v. International Stock Exchange of the UK and Ireland Ltd, ex parte Else Ltd [1993] 1 QB 534 ***(refd)*** H

R v. Michael S. Chance Ex Parte Smith & Ors [1995] BCC 1095 ***(refd)***

R v. Panel on Take-overs and Mergers, ex parte Datafin plc [1987] QB 815 ***(refd)***

R v. Secretary of State for Education and Science, ex p Avon County Council [1991] 1 QB 558 ***(refd)***

R v. Securities and Futures Authority ex p Panton (unreported 20 June 1994) ***(refd)*** I

A *Rekapacific Berhad v. Securities Commission & Anor and Other Appeals [2005] 2 CLJ 108 CA* ***(refd)***
Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 MLJ 132 ***(refd)***
Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***
B

Legislation referred to:
Capital Markets and Services Act 2007, ss. 11, 177, 370
Courts of Judicature Act 1964, s. 3
Rules of the High Court 1980, O. 53 rr. 2(3), 3(1), (5), (6), 5
C Securities Industry Act 1983, ss. 86(b), 122c

Administrative Appeals Tribunal Act 1975 [Aust], s. 41(2)
Administrative Discussions (Judicial Review) Act 1977 [Aust], s. 15

For the appellant - Lim Chee Wee (Ruth Garnet Maran with him); M/s Skrine
D
For the respondent - Lee Yit Siong (Cheah Sin Chan with him); M/s Adnan Sundra & Low

[Appeal from High Court, Kuala Lumpur; Judicial Review No: R1-25-77-2008]
E

Reported by Andrew Christopher Simon

JUDGMENT

F

Heliliah Mohd Yusof JCA:

[1] The appellant (the respondent in the High Court) namely Bursa Malaysia Securities Berhad (or Bursa) lodged an appeal against the decision of the High Court rendered on 28 March
G 2008 as follows:

(i) granting leave in the application for judicial review filed by the respondent in the appeal (the applicant in the High Court) namely Gan Boon Aun (GBA).

H

(ii) further allowing an oral application for an order to stay certain deliberations which were to have been made on 31 March 2008 by the appellant, Bursa.

I

[2] The application for leave filed by GBA sought to commence proceedings to obtain:

(a) An order of *mandamus* that the hearing and/or proposed deliberations brought by Bursa Malaysia Securities Berhad under its letters dated 19 February 2008 and 27 February 2008 against GBA pursuant to the provisions of the Bursa Malaysia Securities Berhad Listing Requirements (LR) be deferred *sine die* until after the final disposal of Kuala Lumpur Sessions Court Criminal case No. 62A-302-07 and all appeals thereof, on the grounds stated in the statement in support of the application for leave.

(b) An order of Prohibition and/or Injunction against Bursa Malaysia Securities Berhad to defer any further decision (s) by BMSB to enforce under the provisions of the LR against the applicant until after the final disposal of Kuala Lumpur Sessions Court Criminal case No. 62A-302-07 and all appeals thereof, on the grounds stated in the statement.

[3] On 28 March 2008 after having considered written submissions filed by Bursa and GBA the High Court judge granted leave for the commencement of proceedings in respect of the reliefs sought. An *interim* stay of the deliberations of the Listing Committee was also ordered. The grounds for his decision are not available. The proceedings for judicial review has been fixed to commence on 9 August 2012.

[4] Hence this appeal has arisen from a decision of the High Court judge given at the first stage of an application for leave for judicial review filed pursuant to O. 53 r. 3 Rules of the High Court 1980 (RHC 1980) namely, at the stage of the application for leave itself. Before embarking on the issues raised the background and essential facts leading to the appeal need to be elucidated.

Background

[5] Bursa is a stock exchange vested with statutory functions under the Capital Markets and Services Act 2007 (CMSA 2007) to ensure an orderly and fair market in the securities that are traded through its facilities. To be noted is that the CMSA 2007 has superseded the Securities Industries Act 1983. Specific

mention is also to be made of s. 11 of the CMSA 2007 which provides:

> Section 11
>
> (1) For the purposes of this section, sections 12, 13 and 27:
>
> (a) "exchange" refers to a stock exchange or a futures exchange; and
>
> (b) "relevant person" means a participating organisation or an affiliate.
>
> (2) It shall be the duty of an exchange to ensure, so far as may be reasonably practicable, an orderly and fair market in the securities or futures contracts that are traded through its facilities.
>
> (3) In performing its duty under subsection (2), the exchange shall
>
> (a) act in the public interest having particular regard to the need for the protection of investors; and
>
> (b) ensure that where any interests that it is required to serve under any law relating to corporations conflict with the interest referred to in paragraph (a), the latter shall prevail.
>
> (4) It shall be the duty of the exchange to take appropriate action as may be provided under its rules for the purpose of monitoring or securing compliance with such rules.

[6] In the discharge of its statutory duties, Bursa issues rules and requirements which are monitored and enforced. A company that is listed in the Official List of the Bursa is governed by Listing Requirements (LR) that set out the minimum standards of conduct that must be complied by listed companies. The purpose of the LR is also to specify the requirements that must be complied by applicants, listed issuers, management companies trustees, the directors officers or other persons to whom the LR is directed.

[7] The underlying principles upon which the LR are based include that of the requirement that the investors and public shall be kept fully informed by the listed companies of all facts or information that might affect their interests and in particular, full, accurate and timely disclosure shall be made of any material information which may reasonably be expected to have material effect on the price, value or market activity in the securities of

listed companies or the decision of a holder of securities of the listed company or an investor in determining his choice of action.

[8] In the context of this appeal specific attention has been drawn to the following provisions of the LR that is:

(i) Paragraph 9.16(1) which stipulates that the contents of the press or other public announcement is as important as its timing. A listed issuer must ensure that each announcement is factual clear, unambiguous, accurate, succinct and contains sufficient information to enable investors to make informed investments decision.

(ii) Paragraph 9.22(1) – a listed issuer must give the Exchange for public release, an *interim* financial report that is prepared on a quarterly basis (hereinafter referred to as "quarterly report"), as soon as the figures have been approved by the board of directors of the listed issuer, and in any event not later than two months after the end of each quarter of a financial year.

(iii) Paragraph 9.23 – a listed issuer must ensure that the issuance of the annual audited accounts and annual report by a listed issuer shall be as follows:

(a) the annual report shall be issued to the listed issuer's shareholders and given to the Exchange within a period not exceeding six months from the close of the financial year of the listed issuer; and

(b) the annual audited accounts together with the auditors' and directors' reports shall, in any case, be given to the Exchange for public release, within a period not exceeding four months from the close of the financial year of the listed issuer unless the annual report is issued within a period of four months from the close of the financial year of the listed issuer.

(iv) Paragraph 16.11 – a director of a listed issuer must not:

(a) cause, aid or abet a breach of these requirements by such listed issuer; or

A (b) permit, either knowingly or where he had reasonable means of obtaining such knowledge, a listed issuer to commit a breach of these requirements.

(v) Paragraph 16.17 sets out the various penalties that may be B imposed on the listed company and the directors for breach of the LR.

[9] Transmile is a company listed in the Official List of the Bursa. GBA was appointed a non-independent executive director C cum Chief Executive Officer of Transmile until 19 June 2007 after which he held the position of non-executive director of Transmile. Particularly relevant in this appeal are paras 2.02 and 2.04 of the LR which Transmile and GBA are obliged to adhere to:

2.02 Purpose of these Requirements

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The purpose of these Requirements is to set out the requirements that must be complied with by all applicants, listed issuers, management companies, trustees, their directors, officers, advisers or other persons to whom these Requirements are directed. Failure to comply with any of E these Requirements will amount a breach in respect of which actions may be taken and/or penalties may be imposed.

...

F **2.04 Obligation to comply**

(1) A listed issuer whether or not admission of its securities shall have taken place prior to these Requirements being prescribed shall by virtue of its admission to the Official List, be bound by these Requirements and the G Rules of the Exchange.

(2) A listed issuer, a management company, a trustee, its directors, officers, advisers or any other person to whom these Requirements are directed must comply with these requirements for so long as the listed issuer H shall remain on the Official List. This applies even during periods when a listed issuer's securities are suspended from trading.

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[10] The summary of facts leading to the application being filed for leave for judicial review is the following.

[11] Transmile had reported:

(i) A net profit of RM157.38 million in its fourth quarterly report for the financial year ended 31 December 2006 (4th QR 2006 issued on 15 February 2007); and

(ii) A net profit of RM84.386 million in its annual audited accounts for the financial year ended 31 December 2005 (AAA 2005) issued on 27 April 2006.

Transmile then made an announcement on 16 June 2007 of material adjustments to be made to its financial statements pursuant to a special audit by Moores Rowland Risk Management Sdn Bhd. On 2 July 2007 Transmile issued its annual audited accounts to Bursa for the financial year ended 31 December 2006 (AAA 2006) reporting a net loss of RM126.329 million and a restated annual audited accounts (AAA 2005) reporting a net loss of RM369.563 million.

On 24 May 2007 Bursa issued a notice to show cause to GBA as to why he should not be penalised for breaching para 16.11(a) and (b) LR in respect of the delay in the submission of AAA 2006 submitted on 2 July 2007 when it should have been done on 30 April 2007. On 10 July 2007 another show cause notice was issued in respect of the delay in the submission of the annual report for the financial year ended 31 December 2006 (AR 2006) as well as the Quarterly Report for the First Quarter ended 31 March 2007 (or 1st Quarter 2007) where both were submitted on 15 August 2007 when both should have been submitted on 30 June 2007 and 31 May 2007 respectively.

[12] On 12 July 2007 the Securities Commission preferred criminal charges against GBA pursuant to s. 86(b) of the Securities Industry Act 1983 (SIA 1983) read with s. 122c of the same in relation to the 4th OR 2006. Those provisions of the SIA 1983 have since been superseded by ss. 177 and 370 of the CMSA 2007 respectively. Section 86 of the SIA 1983 states:

> 86. Subject to section 87B, a person shall not make a statement, or disseminate information, that is false or misleading in a material particular and is likely to induce the sale or purchase of securities

by other persons or is likely to have the effect of raising, lowering, maintaining or stabilizing the market price of securities if, when he makes the statement or disseminates the information:

(a) he does not care whether the statement or information is true or false; or

(b) he knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.

[13] The charge itself states:

That you, between 28 February 2006 to 15 February 2007, at Bursa Malaysia Securities Berhad, Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, abetted Transmile Group Berhad (Company No. 373741-W) in making a statement that is misleading in a material particular in Transmile Group Berhad's "Quarterly Report On Unaudited Consolidated Results For The Financial Year Ended 31 December 2006" and the misleading statement is underlined in red in the Appendix to this charge, and the said statement is likely to induce the purchase of securities of Transmile Group Berhad by other persons, and when the statement was made Transmile Group Berhad ought reasonably to have known that the statement is misleading in a material particular, and you have thereby committed an offence under section 86(b) read together with section 122C(c) of the Securities Industry Act 1983 (Act 280) and punishable under section 88B of the same Act.

[14] The said provision and the charge do not contain any reference to delay. By way of a notice dated 20 August 2007 GBA was informed that the Bursa fixed the first date of hearing in respect of the notices to show cause dated 24 May 2007 and 10 July 2007 termed the enforcement proceedings. The hearing was fixed for 29 August 2007. In reply to this GBA by a letter dated 27 August 2007 stated, *inter alia*:

5. Bursa will have already noted from my letter of 8-8-2007 (which is not enclosed in the Memorandum), which I enclose herewith for ease of reference, that the Securities Commission has initiated charges against certain officers of the Company, including myself on 12-7-2007 and I have claimed trial to the relevant charge.

6. The relevant suit no. is 62A-302-07 which is fixed for trial from 23-1-08 to 25-1-07. As I understand it, the Court will need to address its mind as to whether certain of the

Company's officers had knowingly abetted the Company in issuing false or misleading unaudited accounts for the financial year ended 31 December 2006 of the Company (4th QR 2006).

7. ...

8. Hence, Bursa's *proposed deliberation will cause an overlap on a very central issue before the Court. Any representations or decision made is sub-judice.* For this reason, I am constrained from making any substantive comments before Bursa for the deliberation on 29-8-2007. For this reason, I am also unable to attend and make oral representations.

9. That being the case, it is my humble suggestion that Bursa defers or stay this deliberation pending the outcome of the Court trial. In the *interim*, I reserve all my rights to make representations at such future or deferred deliberations.

10. In the event Bursa should decide to proceed with deliberations and decide on 29-8-2007, *I shall have no alternative but to seek legal redress on the validity of such proceedings and/or any adverse decision made against me.* (emphasis added)

[15] Bursa *vide* letter dated 4 September 2007 responded to the averment that the matter is *sub judice* in the following terms:

Please note that it is Bursa Securities' views that there is no issue of sub-judice and the enforcement action by Bursa Securities against you for breach of paragraph 16.11 of the LR in respect of the Company's non-submission of the AAA 2006, AR 2006 and 1st QR 2007 within the stipulated timeframes in the discharge of Bursa Securities' statutory duty would not prejudice the fair and proper trial of the Suit based on, amongst others, the following grounds:

(i) *Although there may be some overlap in the facts* in the enforcement action by Bursa Securities against you and in the Suit, the *considerations are wholly different.*

The issue for consideration by Bursa Securities *essentially relates to the Company's non-submission of the AAA 2006, AR 2006 and 1st QR 2007 within the stipulated timeframes under the LR and your culpability as a director of the Company in this respect. This is wholly different from the issue as to whether the 4th QR 2006 was in fact false or misleading which is required to be determined by the Court in the Suit.* Notwithstanding the allegation that the accounting defects in the 4th QR 2006 have caused the delay in the submission of the AAA 2006,

AR 2006 and 1st QR 2007, the issue as to whether the accounts are in fact misleading or false is not an issue for determination by Bursa Securities in this enforcement for delay in submission of the financial statements; and

(ii) In addition, *the enforcement action under the LR and the Suit can proceed simultaneously as they operate in distinct and different jurisdictional areas.*

In view of the above, you are hereby required to submit your written response to all matters contained in the Listing Committee Memo No. L95 of 2007 which was earlier forwarded to you within *seven (7)* days from the date of receipt of this letter, failing which Bursa Securities shall assume that you have no further representations and the Listing Committee will proceed to deliberate on the matter without further notice to you.

(emphasis added)

[16] On 21 March 2008 GBA filed the notice pursuant to O. 53 r. 3 RHC 1980 seeking leave to commence proceedings for the various reliefs described above. It has also been indicated to us that at the proceedings before the High Court judge no formal application was made for the stay of the deliberations scheduled by the Bursa for 31 March 2008 until the hearing of the judicial review. The grounds submitted in support of the application for leave for judicial review constitute the very same grounds which have been canvassed in this appeal.

[17] The grounds are listed as follows:

(1) In view of the pending Criminal Proceedings, the deliberation to be conducted by Bursa on 31 March 2008 would be sub judice:

(2) Bursa's deliberation is a decision amenable to judicial review as it is a body that performs a public duty in prescribing and administering the LR which is to ensure all public listed companies in Malaysia conform to the listing requirements; and it is a regulatory body of all public listed companies in Malaysia;

(3) GBA has met all the prerequisites for the application for judicial review pursuant to O. 53 r. 3 of the Rules of the High Court 1980; and

(4) GBA's application for judicial review is not frivolous or vexatious and GBA has a good arguable case.

[18] The principal contention is that the High Court judge has erred in law and in fact in granting leave. At the core of this appeal lies the question of whether the Bursa's decision to proceed with wide enforcement measures against the GBA in furtherance of its listing requirements is non justiciable as it entails the review of a decision of a regulator of a capital market who is vested with a statutory duty to ensure so far as reasonably practicable a fair and orderly market for securities trade in the Bursa's official list.

[19] The relevant provisions of O. 53 r. 3 RHC 1980 pursuant to which the application for leave was made stipulate,:

(1) No application under this Order shall be made unless leave therefor has been granted in accordance with this rule.

(2) ...

(3) ...

(4) ...

(5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[20] Judicial review involves a discretionary remedy and for consideration here is the question of the principles by which the discretion is to be exercised at the application for leave stage, which in effect, is the preliminary stage and which stage has been termed by counsel for the Bursa as the threshold test for leave. In *R v. Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815, 842 Sir J Donaldson MR commented: 'an application for judicial review is not an appeal'. It is averred that GBA has to

establish an arguable case. In the context of this appeal the expression "arguable case" has been used interchangeably with the expression *"prima facie"* as well as the expression "threshold requirement". It is agreed by counsels for the Bursa and GBA that there must be some substance in the grounds supporting the application such that the application for leave is not rendered frivolous or vexatious.

[21] It is noted that O. 53 r. 3 RHC 1980 has no equivalence to the corresponding provision O. 53 r. 3(1) of the English Supreme Court Practice 1993 which makes a specific stipulation that "the court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates. Irrespective of the absence of the words "sufficient interest" the question of what constitutes an arguable case or a *prima facie* case or establishing a threshold requirement, namely, whether an applicant has the requisite standing is a mixed question of fact and law. We have been referred to *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 and *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 MLJ 132 and cited to us are judicial propositions that elucidate the principles that guide a court in exercising its discretion at the leave stage. However it is noted that in both cases cited the relief sought were made in respect of illegalities in the processes and or invalid acts undertaken by statutory bodies. *Ta Wu*'s case, *supra*, referred to another principle namely that leave will be given in exceptional circumstances. It would appear that what has been expressed in *Ta Wu*'s case is that when there is an alternative remedy of appeal leave will be granted in exceptional circumstances such as:

(a) a clear lack of jurisdiction.

(b) a blatant failure to perform some statutory duty.

(c) a serious breach of the principles of natural justice.

[22] Two decisions of the Court of Appeal are noteworthy of mention here. In *Tang Kwor Ham & Ors. v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 the Court of Appeal refers to a two stage process where an application for leave is made and at the leave stage the High Court should not go into the merits

of the cases. In *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532 two points require mention. The first point for mention is that arguments such as the availability of an alternative remedy go to the merits of the substantive application and ought not to be dealt with at the leave stage. Applying this approach on an extension, the High Court is therefore precluded from considering whether there are exceptional circumstances for granting leave.

[23] The second point is the matter of the standing of the applicant which is elaborated as follows:

> [16] ... There is a single test of threshold *locus standi* for all the remedies that are available under the order. It is that the applicant should be "adversely affected". The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words "adversely affected". At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned. See, *Finlay v. Canada* [1986] 33 DLR 421. This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty of property in the widest sense (see, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 CLJ 771) has been or is being or is about to be infringed. In all such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing. See, for example *Thorson v. Attorney General of Canada* [1975] 1 SCR 138.
>
> [17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as *de minimis*. In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in *Malik Brothers v. Narendra Dadhich* AIR [1999] SC 3211, where, when granting leave, it was said:
>
> > Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the

> betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.

[18] In an ordinary case, if on a reading of the application for leave to issue judicial review the court is satisfied that the applicant has neither a sufficient personal interest in the legality of the impugned action in the sense already discussed, nor is the application a public interest litigation, then leave may safely be refused on the ground that the applicant is not a person "adversely affected". In this context, the court must bear in mind what Lord Diplock said in *Inland Revenue Commissioners v. National Federation of Self-employed & Small Businesses Ltd* [1982] AC 617:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

[24] The emphasis is that the question of standing can be properly considered in the light of matters such as the duties (if any) which the applicant contends the respondent was under in respect of which it is contended that those duties have been breached as well as the proper construction of any relevant statutory material or regulations. Reverting to the circumstances in this appeal, GBA's application for leave is primarily grounded upon the alleged applicability of the *sub judice* rule whereby in GBA's letter of 27 August 2007 objections were directed to the

deliberations intended to be convened by the Listing Committee as enforcement measures which were eventually scheduled for 31 March 2008.

The *Sub Judice* Rule

[25] At the time of the hearing of the GBA's application pursuant to O. 53 r. 3 RHC 1980 the trial of the criminal proceedings was scheduled to be conducted from 5 May 2008 to 8 May 2008 and fixed further for hearing on 17 November 2008. It is therefore averred that in view of the pending trial the deliberation to be conducted by Bursa scheduled for 31 March 2008 would be *sub judice*. It is obvious that the argument advanced by GBA that in view of the pending criminal trial, the deliberations to be conducted by the Bursa on 31 March 2008 would be *sub judice* is also influenced by the Bursa's acknowledgement that there are some overlap of facts in the enforcement action by the Bursa against GBA and in the criminal proceedings preferred by the Securities Commission.

[26] The Bursa has maintained "that there is no issue of *sub judice* and that the enforcement action against the applicant in the discharge of statutory duties will not prejudice the fair and proper trial of the pending criminal suit initiated by the Securities Commission". GBA by his own averments had contended that the representations to be made by him before the Listing Committee for the purposes of the enforcement proceedings in respect of the show cause letters would become *sub judice* pending the outcome of the trial. Admittedly there is a third show cause in relation to deviations between audited and unaudited accounts for the year 2006, as well deviations between audited and restated audited results no deliberation but no date has been scheduled for the deliberations to take place.

[27] Whilst there is a reminder from counsel for GBA that the court should not dwell on the merits, the court is still able to embark on a perusal of the matters as put before it by the parties in order to evaluate whether GBA has established an arguable case.

[28] This court has been invited through oral submissions to embark on some assumptions that if the deliberations of the Listing Committee (LC) were to be permitted the outcome of it

would be various matters relevant to the criminal trial would be publicised such as to cause prejudice or even to pervert the criminal proceeding that are pending.

[29] The law in relation to what may be published concerning current legal proceedings is sometimes referred to as the *sub judice* rule. The publications are such they are intended to impede or prejudice the administration of justice which may in turn constitute acts punishable as contempt of court. The true nature of the doctrine itself requires that there have to be established an *actus reus* and *mens rea* to cause certain publications which would have a prejudicial effect on the criminal proceedings. In the appeal before us it cannot even be gleaned whether the situation could lead to civil contempt. Hence the court is invited to consider assertions which are speculative.

[30] In *AG v. Times Newspaper Ltd* [1973] 3 All ER 54 Lord Denning MR stated:

> When litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause. Even if the person making the comment honestly believes it to be true, still it is contempt of court if he prejudges the truth before it is ascertained in the proceedings. To that rule about a fair trial, there is this further rule about bringing pressure to bear on one of the parties to a cause so as to force him to drop his complaint, or to give up his defence, or to come to a settlement on terms which he would not otherwise have been prepared to entertain. The law should be maintained in its full integrity. We must not allow 'trial by newspaper' or 'trial by television' or 'trial by any medium' other than the courts of law. This law applies only when litigation is pending and is actively in suit before the court and there must appear to be 'a real and substantial danger of prejudice' to the trial of the cause or matter or to the settlement of it.

[31] Although it suggested here that at the crux of the matter there may be some overlap of facts, in effect this should not blur the different functions and the different objectives. It is trite a court of law in conducting a trial is guided *inter alia* by rules of

evidence pertaining to the admissibility of evidence. It is *apropos* to mention judicial statements made in the course of *R v. Michael S. Chance Ex Parte Smith & Ors* [1995] BCC 1095.

[32] Some mention of the facts in that case is necessary in view of certain similarity of circumstances. There was in that case an application for judicial review in which the applicants are the United Kingdom partnership of Coopers & Lybrand and three named individual partners. The respondent is the Executive Council appointed for the purposes of the Joint Disciplinary (JD) of the Institute of Chartered Accountants which is the applicant's professional body. The application challenges a decision by the respondent refusing the applicant's request for a stay of the JDS enquiry and anticipated consequent disciplinary proceedings against the firm and/or the individual named partners pending the disposal of various civil actions for damages against the applicants arising out of the same matters. On 5 November 1991 Robert Maxwell the Chairman of the Mirrors Group of Newspapers plc died. Following his death it became apparent that there had been large misappropriation of assets belonging to the pension funds of various public companies with which he was concerned. Other Maxwell companies were the trustees and/or managers of the assets in question. Coopers & Lybrand were the auditors both of the pension funds and of the companies that were the trustees and managers of the relevant assets of those funds. These stewardship came under scrutiny one of which was that they have played an important role in various enquiries and investigations consequent upon the discoveries. One of the investigations is that which was being undertaken by the Serious Fraud Office into possible criminal conduct which resulted in criminal proceedings against a number of individuals connected with the Maxwell Group Companies and the first criminal proceeding was due to commence.

[33] In that case, the position was also similar in that submissions were made with regard to the real risk of prejudice that may lead to injustice arising from an overlap of facts. Stay of the disciplinary proceeding was refused. What requires specific mention is the statement of Henry LJ in delivering judgment as follows:

> ... the suggestion is made that the connection of the JDS enquiry might prejudice the criminal trials. The parties and the Court in those trials will be alive to any potential risk of prejudice to them.

A The responsibility for preservation of the integrity of those trials rest with the Courts in those trials. In the unlikely event of their integrity being threatened by the hearing (in private in the first instance) of the disciplinary proceedings or the publication of the finding thereof, then the criminal court has ample powers to obtain an order restraining publication until after the conclusion of the criminal trials. There are no grounds for this court interfering at this stage on that score.

[34] It is found at the stage of the application for leave GBA is unable to establish what parts of the material overlap which would form part of the materials in the criminal proceeding would also be part of the deliberations of the enforcement proceedings such that there would also be publications of the subject matters of the deliberation. In other words the court is being invited to embark on a form of investigative journey into the materials which are likely to be placed before the deliberations of the Listing Committee as well as the criminal proceedings. Matters before the LC relate to the issue of delay. The court in the pending criminal proceeding based on the charge will consider essentials of what constitute "making misleading statements". The respondent has not shown that there is here a situation where a court and the Listing Committee would contemporaneously be considering the same or identical issues in a manner that one would affect the evaluation in the other. There are suggestions that the LC subsequent to its deliberation would be expected to issue publications such that GBA will be prejudiced in facing the trials. At this stage the assertions are conjectural in nature. Neither is it shown that ultimately the decision in the Listing Committee would lead to a predetermination of the matters pending in the criminal trial. Neither prejudice nor the perversion of justice is indicated.

[35] There is therefore here a considerably premature action on the part of GBA. In our view GBA has failed to raise an arguable case. Even assuming it is otherwise there is the related question whether Bursa in its decision to proceed with its statutory duty of conducting the enforcement proceedings is amenable to judicial review.

The Case For Judicial Review

[36] Counsel for GBA has cited *R v. Panel on Take-overs and Mergers, ex parte Datafin plc and another (Norton Opax plc and another intervening)* [1987] 1 AII ER 564 and referred to the statement of Lloyd LJ:

> On the basis of that speech, and other cases to which he referred us, counsel for the panel argues (i) that the sole test whether the body of persons is subject to judicial review is the source of its power, and (ii) that there has been no case where that source has been other than legislation, including subordinate legislation, or the prerogative.
>
> I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: see *R v. Disputes Committee of the National Joint Council for the Craft of Dental Technicians, ex p Neate* [1953] I All ER 327, [1953] I QB 704.
>
> But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as counsel for the applicants submitted, be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. Thus in *R v. Criminal Injuries Compensation Board, ex p Lain* [1967] 2 All ER 770 at 778, [1967] 2 QB 864 Lord Parker CJ, after tracing the development of *certiorari* from its earliest days, said:
>
> > The only constant limits throughout were that the body concerned was under a duty to act judicially and that it was performing a public duty. Private or domestic tribunals have always been outside the scope of *certiorari* since their authority is derived solely from contract, that is from the agreement of the parties concerned.

To the same effect is a passage from a speech of Lord Parker CJ in an earlier case, to which we were not, I think, referred, namely *R v. Industrial Court, ex p ASSET* [1964] 3 All ER 130 at 136, [1965] I QB 377 at 389:

> It has been urged on us that really this arbitral tribunal is not a private arbitral tribunal, but that, in effect, it is undertaking a public duty or a quasi-public duty and, as such, is amenable to an order of *mandamus*. For my part, I am quite unable to come to that conclusion. It is abundantly clear that they had no duty to undertake the reference. If they had refused to undertake the reference they could not be compelled to do so. I do not think that the position is in any way different once they have undertaken the reference. They are clearly doing something which they were not under any public duty to do, and, in those circumstances, I see no jurisdiction in this court to issue an order of mandamus to the Industrial Court.

More recently in *R v. BBC, ex p Lavelle* [1983] I All ER 241, [1983] 1 WLR 23 Woolf J had to consider an application for judicial review where the relief sought was an injunction under Ord 53, r. 1(2). The case was brought by an employee of the BBC. In refusing relief Woolf J said, ([1983] 1 All ER 241 at 249, [1983] 1 WLR 23 at 31):

> Paragraph (2) of r. 1 of O. 53 does not strictly confine applications for judicial review to cases where an order for mandamus, prohibition or certiorari could be granted. It merely requires that the court should have regard to the nature of the matter in respect of which such relief may be granted. However, although applications for judicial review are not confined to those cases where relief could be granted by way of prerogative order, I regard the wording of O. 53 r. 1(2) and sub-s. (2) of s. 31 of the [Supreme Court Act 1981] as making it clear that the application for judicial review is confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character. The disciplinary appeal procedure set up by the BBC depends purely on the contract of employment between the applicant and the BBC, and therefore it is a procedure of a purely private or domestic character.

So I would reject counsel for the panel's argument that the sole test whether a body is subject to judicial review is the source of its power. So to hold would in my judgment impose an artificial limit on the developing law of judicial review. That artificiality is well illustrated in the present case by reference to the listing

> regulations issued by the Council of the Stock Exchange. As the foreword to the current edition makes clear, a new edition of the regulations became necessary as the result of the Stock Exchange (Listing) Regulations 1984, SI 1984/716. Those regulations were made as the result of a requirement of an EEC Council directive. Counsel for the panel conceded that the listing regulations are now the subject of public law remedies. By contrast (if his submission is correct) the code, which is the subject not of a Council directive, but of a Commission recommendation, is not.

[37] The contention that Bursa's decision to proceed with the deliberations is amenable to judicial review is premised on the following (i) that Bursa is a body that performs a public duty in prescribing and administering the LR which is to ensure all public listed companies in Malaysia conform to the listing requirements and (ii) it is a regulatory body of all public listed companies in Malaysia. Apposite to this is the fact that Bursa is a stock exchange and pursuant to s. 11 is vested with a statutory duty, *inter alia*, to "ensure" so far as may be reasonably practicable an orderly and fair in the securities or future contracts that are traded through the facilities. Section 11 has been previously cited above. Noteworthy is s. 11(3) where it is emphatic that the exchange shall "act in the public interest having particular regard to the need for the protection of investors". This aspect has not been challenged at all in the circumstances of this appeal.

[38] To revert briefly to *R v. Panel on Take-overs, supra,* it is also stated by Lloyd LJ:

> So once again one come back to what I regard as the true view, that it is not just the source of the power that matters, but also the nature of the duty ...

[39] It has been contended before us that Bursa has a statutory duty to maintain an efficient, well-informed and internationally competitive market for the trading of securities. These are elements that will foster and anchor the investor's public confidence. In seeking to enhance the statutory duty Bursa has a two fold approach. Firstly the Bursa issues monitors and enforces rules and requirements pertaining to the conduct of listed companies. Secondly Bursa would necessarily be committed to undertake swift and deterrent enforcement measures against errant listed companies on its directions. The efficacy of Bursa's enforcement actions is to be sustained by its own internal procedures, commencing with a show cause notice, deliberation

and decision making process by a tribunal that is intended to decide on matters, concomitant with its public interest object of promoting market integrity and invest protection. Counsel for the Bursa has made a painstaking effort to elucidate that while there may be an overlap of materials to be presented in the enforcement proceedings of Bursa and the criminal proceedings nevertheless in the case of the latter the issues to be raised by the Securities Commission in preferring charges against GBA remain disparate as and when those issues are being deliberated in the criminal proceedings that remain pending. In essence at the heart of the enforcement proceedings of Bursa, as a regulator of a capital market, timeliness and accuracy are crucial factors.

[40] Counsel for the Bursa has also referred to the decisions in *Kwikasair Industries Ltd v. Sydney Stock Exchange Ltd BC 6800002* [1968] CCH A SLC 30, 71 and *R v. International Stock Exchange of the UK and Ireland Ltd, ex parte Else Ltd* [1993] 1 QB 534 which reflect the importance of the Stock Exchange in its role of upholding its public duty as the regulator of the capital market.

[41] While the Bursa remains a body vested with statutory powers there are peremptory requirements that the Bursa itself has to observe and implement to sustain the required orderly and fair market in respect of securities or future contracts. Uppermost it has to act in public interest singularly for the protection of investors in the financial sectors. There is therefore here a spectrum of matters in the realm of financial implications and complexities. In effect there is a homogenised issue of a public duty and private law matters. The situation warrants a reference to the judicial statement in *R v. Securities and Futures Authority ex p Panton* (unreported 20 June 1994) per Sir Thomas Bingham:

> It seems to me quite plain they are bodies over whom the court can, in appropriate circumstances, and will exercise a supervisory jurisdiction, but recognition of that jurisdiction must in my judgment be combined with a recognition that the clear intention of the Act is that the bodies established under that Act should be regulatory bodies and that it is not the function of the court in anything other than a clear case to second guess their decisions or, as it were to look over their shoulder.

[42] Apart from submissions premised on the *sub judice* rule GBA has not been able to persuade this court that the enforcements

proceedings are in excess of statutory authority or so erroneous in law such that in that regard the Bursa is rendered susceptible to judicial review. In a highly fluid financial market the true nature of the reliefs sought are calculated to impose a crippling delay in derogation of the principle of timeliness and accuracy which is inept in matters of financial control.

The Delay That Is Alleged In The Filing Of The Application For Leave

[43] It is also an issue here whether GBA in filing the application for leave for judicial review has adhered to the time frame prescribed in O. 53 r. 3(6). It is stipulated therein that an application "shall be made promptly and any event within 40 days from the date when grounds for the application first arise or when the decision is first communicated to the applicant".

[44] Here again GBA is contesting the averment of the Bursa that the application was made outside the time prescribed. It is essential to note that there is a requirement for the application to be made promptly and in any event within 40 days. The contention that the application for leave is timeous is predicated on the fact that the date of filing *(ex parte)* being 21 March 2008, it was within the 40 days required. The issue however is what is the material date with effect from which the time limit will begin to operate. On behalf of GBA it is stated to be 19 February 2008.

[45] It is apt to revert to the contents of the letter dated 27 August 2007 where GBA, in response to the letter from the Bursa dated 20 August 2007, first raised the issue of the applicability of the *sub judice* rule (as reproduced above). It was also in that very letter that GBA had himself indicated that in the event Bursa should decide to proceed with deliberations and decide on 29 August 2007 "I shall have no alternative but to seek legal redress on the validity of such proceedings and/or any adverse ...". In essence the ground upon which the application for leave has been made is pivoted on the alleged applicability of the *sub judice* rule and none other. The Bursa's response is found in the letter dated 4 September 2007 (as reproduced above). The relevant portions (to recapitulate) asserted the Bursa's view that there is no issue of *sub judice*, and that while there may be overlap of facts the enforcement under the LR "can proceed

simultaneously as they operate in distinct and different jurisdictional areas". We are also of the view that the different jurisdictional area would also portend that the Bursa in its deliberations and the criminal proceedings would also address different issues with different rules of evidence and the eventual standard of establishing responsibility. In the same letter of 4 September 2007 the Bursa in specific terms reminded GBA that if no written response was made within seven days from the date of receipt of the letter dated 4 September 2007 "Bursa Securities shall assume that you have no further representations and the Listing Committee will proceed to deliberate on the matter without further notice".

[46] It is noted that on 11 September 2007 GBA again opposed the view of Bursa and claimed it was untenable. He in fact insisted that "I must take the position that I am constrained by *sub judice*".

[47] Pursuant to the letter from the Bursa dated 4 September (see above) GBA by a letter dated 11 September 2007 persisted in maintaining that the Bursa should refrain or to defer its proposed deliberations. In an undated letter GBA contended, *inter alia*:

> The fact that the considerations in the enforcement by you is different from the criminal suit and the fact that the standard of proof is markedly disparate is hardly relevant to the issues of *subjudice*.
>
> In the light of our differing views, I shall be grateful if you could kindly grant me an extension of 2 weeks from your dateline to apply to court to seek a declaration as to whether in the circumstances, your action is deemed to be *sub judice* or otherwise. In the meantime, we trust that Bursa Securities will not proceed with any further action.

By letter dated 16 November 2007 GBA attempted to explain the alleged breaches. The Bursa by letters dated 9 October 2007 and 29 October 2007 refuted the issue of *sub judice* and reiterated its position that the enforcement action in the discharge of the Bursa's statutory duty will not prejudice the fair and proper trial of the pending criminal suit initiated by the Securities Commission. A similar letter dated 26 November 2007 was also sent to GBA.

[48] On 19 February 2008 the Bursa notified GBA that the Listing Committee will convene on 29 February 2008 to deliberate. On 22 February 2008 GBA responded and claimed:

> 5. Given that Bursa had not responded to my last letter of 11 September 2007 I was lulled into the impression that Bursa had acceded to my request to defer these proceedings until after the court process on the grounds of *sub judice*.
>
> 6. As such, I will now have to revisit the issue of making an application to court for determination of Bursa's decision to convene a deliberation as conveyed by the Bursa letter. I am advised that under the rules of court I have 40 days from the date of receipt of Bursa's letter (ie, 20th February to apply for relief to question Bursa's decision to proceed.

[49] On 27 February 2008 the Bursa responded in the following terms, *inter alia*:

> Bursa Securities wishes to reiterate its views as stated in our earlier letter dated 4th September 2007 that there is no issue of *sub judice* and that the enforcement action against you in the discharge of Bursa Securities statutory duty will not prejudice the fair and proper trial of the pending criminal suit initiated by the Securities Commission against you.
>
> …
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> Bursa Securities also wishes to put on record that at no time did Bursa Securities accede to your request to defer deliberation of the enforcement action until after determination of the criminal suit against you. Whilst we take of your representations in the letter dated 11 September 2007, no reply was made as we have clearly set out our position in this matter in our earlier letter dated 4 September 2007.

[50] It is found that the material date from which the 40 days is to be calculated is indeed 4 September 2007 and not 19 February 2008. The former date is the actual date upon which the Bursa resisted attempts by GBA to preclude the LC from proceeding to deliberate. The letter of 4 September 2007 is antecedent to the letter of 19 February 2008 that is merely indicating the actual date that the Listing Committee proposed to deliberate and in the letter of 4 September 2007 GBA was also invited to submit if he so wished any written response. No explanation or justification is furnished to explain the delay in filing the application in breach of

A the 40 days requirement. In effect the very conduct of GBA in maintaining that the *sub judice* rule apply and declining to submit representations lent itself to a situation where there was a self imposed effluxion of time. It was GBA at the first instance who asserted that he would seek legal redress which materialised in the B form of the application for leave for judicial review when the notice was filed on 21 March 2008. It was a period of more than five months from the date that the Bursa refuted assertions about the applicability *sub judice* rule.

C **[51]** Under the circumstances there is an absence of prompt action without any reasonable explanation given for the delay.

The Order For Stay Of The Deliberations Of The LC

[52] In *Minister of Foreign Affairs Trade and Industry v. Vehicles and* D *Supplies Ltd* [1991] 1 WLR 550, Lord Oliver of Aylmerton observed that:

> A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage E which they have reached, the object being to avoid the hearing or trial taking place.

[53] In *R v. Secretary of State for Education and Science, ex p Avon County Council* [1991] 1 QB 558, CA there is discussion of the difference between a 'stay' and an injunction. Lord Justice F Glidewell said (at p 705D to 706A):

> In my view, this question comes back to the issue whether the phrase 'a stay of the proceedings' is apt to include decisions made by the Secretary of State, and the process by which he reached such decisions. If I am correct in my view that the phrase is G wide enough to embrace such decisions, it follows that what is sought is just as much a stay as it would be in relation to a decision or judgment of an interior court. *It is not properly described as an injunction, which is an order directed at a party to litigation, not to the court or decision-making body.* Of course, in some respects H an application for judicial review appears to have similarities to civil proceedings between two opposing parties, in which an injunction may be ordered by the court at the suit of one party directed to the other. When correctly analysed, however, the apparent similarity disappears. *Proceedings for judicial review, in the* I *field of public law, are not a dispute between two parties, each with an interest to protect, for which an injunction may be appropriate. Judicial review, by way of an application for certiorari, is a challenge to the way*

in which a decision has been arrived at. The decision-maker may take part in the proceedings to argue that his, or its decision was reached by an appropriate procedure. But the decision-maker is not in any true sense an opposing party, any more than an interior court whose decision is challenged is an opposing party. Thus the distinction between an injunction and a stay arises out of the difference between the positions of the persons or bodies concerned. An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has finally been determined is, in my view, correctly described as a stay. For these reasons I am of the opinion that a decision made by an officer or minister of the Crown can, in principle, be stayed by an order of the court.

If I am correct in my view that the essential question is whether the phrase 'a stay of proceedings' is *apt to include decisions, and the process of arriving at such decisions, made by persons and bodies other than courts of law, and the answer is that it does not include such decisions and processes, it would follow that the courts have no jurisdiction, in judicial review proceedings, to stay decisions of local authorities or other non-judicial decision making bodies*. In other words, the court's jurisdiction or lack of it to order a stay is not dependent on whether the decision-maker is an officer or minister of the Crown. That the court should have the power to order a stay of a decision of a local authority pending the conclusion of a challenge to the decision-making process by way of judicial review I regard as apparent. I have sought to explain my reasons for concluding that the courts indeed have such a power.

[54] In the proceedings before the High Court counsel for GBA made an oral application for an *interim* order to stay the deliberations of the LC scheduled on 31 March 2008. Such an order was prayed for and alluded to for the first time in the written submissions submitted by GBA as the applicant for leave for judicial review. In the circumstances of this case where the application was made *ex parte* the Bursa being a putative respondent was allowed by the High Court judge to file written submissions during the hearing of the *ex parte* notice of application for leave. Since the *ex parte* stage was not converted into an *inter partes*, which could have been done, GBA is not permitted, during the course of hearing this appeal, to raise objections to the effect that the Bursa is making statements from the Bar in an alleged failure to file affidavits to oppose the *ex parte* notice of application for leave. It was clear here that the judge has exercised his discretion in allowing written submissions to be made on behalf of

the Bursa at the *ex parte* stage. The action of the trial judge however shows that if he had entertained any doubt that GBA has presented an arguable case he should have converted the *ex parte* proceeding into an *inter partes* stage. The anamoly here is that nevertheless submissions were allowed at the *ex parte* stage resulting *inter alia*, in the granting of the order for stay arising from an oral application. It would appear that the learned judge must have exercised his discretion pursuant to O. 53 r. 5 RHC 1980.

[55] Order 53 r. 3(5) RHC 1980 provides that the grant of leave under that rule shall not operate as a stay of the proceeding in question. In the circumstances of this appeal GBA in moving an oral application for stay should have provided grounds in order to enable the judge to exercise his discretion to grant stay. The order for stay in the circumstances of this appeal is tantamount to a prohibitory relief akin to an injunction. Order 53 r. 2(3) expressly provides that an order of injunction may be granted but it has to be in the context of the substantive application for judicial review.

[56] At the leave stage O. 53 r. 3(5) indicates only a stay is permitted and hence although there may be similarities to an injunction, the stay order is specifically intended as an interlocutory order pending the disposal of the substantive application for judicial relief. In the absence of grounds of judgment we do not have the benefit of being acquainted with the reasons for which the discretion was exercised in favour of GBA when the order for stay was granted.

[57] Two questions arise. Firstly the decision in *ex p Avon, supra*, discusses the question whether the phrase "stay of the proceedings" is apt to include the processes by which authorities other than courts arrive at a decision. In that case no doubt the question arose in relation to decisions made by the Secretary of State that is an executive decision. In that case however the Court of Appeal appeared to have leaned to the interpretation that the phrase "stay of the proceedings" is capable if being applied to stay of decisions of "local authorities or other non judicial decision making bodies".

[58] The granting of an order of stay in this appeal was granted as an order ancillary to the granting of leave. Hence similar to the consideration of the granting of an application for an interlocutory injunction, the applicant has to satisfy the requirements of

establishing an arguable case or a *prima facie* case. In this appeal there is totally absent any affidavit supporting the application for an order for stay. Any arguments put forth in support of the order for stay must also be taken as statements from the Bar!

[59] The second question relates to the word "proceeding". The word is not defined in the RHC 1980. The definition is to be found in s. 3 of the Courts of Judicature Act 1964 (CJA 1964) which provides, *inter alia*, "proceeding means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding". It is debatable whether the words "any proceeding whatsoever of a civil nature" are wide enough to envisage a body such as the Listing Committee to put a stop to the further conduct of its deliberations. The term "proceeding" is not further defined in Interpretation Acts 1948 and 1967 and hence it must be given the ordinary construction in the context in which it appears.

[60] Counsel for the Bursa has referred to (i) *Rekapacific Berhad v. Securities Commission & Anor and Other Appeals* [2005] 2 CLJ 108 (ii) *Harris Mohd Salleh v. The Returning Officer, Ismail Majin & Ors And Another Petition (No 2)* [2001] 3 CLJ 838 (iii) *Otter Gold Mines Ltd v. Deputy Forest (AAJ) and Others* [1997] 22 AC SR 713. In *Rekapacific, supra,* the Court of Appeal has set aside an order for stay of judicial review proceedings pending appeal on the ground that the shareholders of the company would not suffer irreparable harm from the delisting of the company and hence ought not to have granted. The test there would appear to be a test applicable for stay until the disposal of an appeal. In *Harris Mohd Salleh, supra,* it was again a case of stay pending appeal to a court and reference was made to the fact that special circumstances must be established. In the *Otter Gold Mines Ltd, supra,* the objection for stay arose in circumstances which were again vastly different. There the Federal Court of Australia was interpreting the provision of s. 41(2) of the Administrative Appeals Tribunal Act 1975 which expressly conferred on the Administrative Appeals Tribunal pursuant to the said s. 41(2) to impose a stay on its own decision. Moreover under s. 15 of the Administrative Discussions (Judicial Review) Act 1977 (or AD (JR) Act) was an enabling provision which confers on the court express powers to order a stay on to suspend the operation of the decision of the

A Administrative Appeals Tribunal. It is indicative that the Federal Court of Australia was conferring a framework of legislative which enabled the judicial review of the decision of an administrative character stipulated under an enactment.

B **[61]** In this appeal the order for stay has been made in respect of an internal body of the Bursa which has not even embarked on its deliberation. The LC of the Bursa is just about to commence a process of deliberations and which is expressly allowed within the framework of the Bursa itself.

C **[62]** It has been indicated above that the GBA has failed to raise an arguable case as the vein of his application is solely grounded on the alleged application of the *sub judice* rule. The court would be embarking on a process of re-writing a subsidiary legislation namely the RHC 1980 if it were to permit an interpretation of the D words "proceedings in question" to be applicable to an internal decision making process made by Bursa to convene a committee to deliberate on the non compliance by GBA of the Listing Requirements of the Bursa. There is here a serious and clear misdirection in the exercise of a discretion which warrants appellate E interference. It would spell an excess of power if "stay of proceedings" in this appeal would be extended to the internal deliberations of the Bursa being a commercial entity vested with regulatory measures in the capital market. Once again nothing has been alleged of illegalities but merely unsubstantiated allegations of F prejudice amounting to an abuse of process in seeking the court's intervention.

[63] For the reasons given above the appeal is allowed with costs here and below. The order of the High Court in granting leave to G apply for judicial review is set aside. The order for stay of the deliberations is also set aside. Deposit is refunded to the Bursa.

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